then there must be proved a *real likelihood* of bias and that reasonable suspicion of bias is insufficient. Thus, bare allegations (as done in the present case) are insufficent. *A fortiori* bare allegations before hearing had hardly commenced.

Finally, what is the "system"which counsel said they fear would produce a likelihood of bias? The judicial and legal service is one of the public services mentioned in Article 132(1) of the Federal Constitution. The authority which exercises jurisdiction over the officers of the service in matters of promotions and discipline is the Judicial and Legal Service Commission established under Article 138 of the Constitution of which the Attorney-General is only a member. There is nothing in law to say that the Attorney-General is head of the service; in fact he cannot be by virtue of Article 138 of the Constitution. An officer belongs to the judicial and legal service but he may serve in various different capacities in the Judicial Department and Legal Department. As normal in the administrative set-up of the public service each department has its own head. And the Attorney-General is *not* the head of the Judicial Department. Thus looking at the legal and administrative framework governing the service I do not think the facts here warrant a conclusion of a real likelihood of bias. If such a conclusion is made it is not the sort of conclusion which in my opinion right thinking persons armed with the proper information and advice would entertain.

Based on the foregoing I do not think I should interfere with the orders made in the lower Courts in Criminal Appeals Nos. 2 and 8 of 1984. Legal bias has not been satisfactorily shown in both cases.

No order on revision.

Applications dismissed.

Solicitors: *Stanley Ponniah, Ng & Soo, Mahadevi Ganeshmurugan.*

BRUNEI REPORTS

TAIB BIN GEMOK v. PUBLIC PROSECUTOR

[A.Cr.J. (Rhind J.) March 30, 1982]
[Bandar Seri Begawan – Criminal Appeal No. 1 of 1982]

Road Traffic – Driving without licence, third party insurance policy and permission of owner of vehicle – Accused, policeman aged 18 years 10 months – Fine of $250 substituted for custodial sentence of 2 months' imprisonment – Motor Vehicle Insurance (Third Party Risks) Enactment (Cap. 90), s.3(1) – Road Traffic Enactment, 1954, ss. 16 & 34(2)

Criminal Law & Procedure – Sentencing – Offence of driving without licence, third party insurance policy and permission of owner of car – Mitigating circumstances – Fine of $250 substituted for custodial sentence of 2 months' imprisonment – Motor Vehicle Insurance (Third Party Risks) Enactment (Cap. 90), s.3(1) – Road Traffic Enactment, 1954, ss. 16 & 34(2).

The appellant pleaded guilty in the Magistrate's Court on 3 charges, viz., driving a vehicle (a) without a licence contrary to section 16 of the Road Traffic Enactment 1954, (b) without a valid third party insurance policy contrary to section 3(1) of the Motor Vehicle Insurance (Third Party Risks) Enactment (Cap. 90), and (c) without the consent of the owner contrary to section 34(2) of the Road Traffic Enactment.

At the time of committing the offences, the appellant was 18 years and 10 months old. He was a police constable.

On the charge of driving without a licence, he was fined $100/- or in default 10 days; on the uninsured driving charge the sentence was two months' imprisonment plus twelve months' disqualification and on the charge of taking and driving away he was fined $100/- or 10 days in default. The appellant appealed against the term of imprisonment.

Held, allowing the appeal: (1) in terms of penalties for criminal offences, a maximum sentence of 6 months' imprisonment and a fine of $1,000/- is indicative that the legislature does not regard an offence as being one of high order of gravity, and for such an offence it would normally only be in a situation where there were aggravating circumstances that a court would take the step of sending an offender, particularly a first offender, to prison. For offences under this section, a prison sentence should be the exception, at least for first offenders;

(2) in the present case, a sentence of imprisonment was wholly wrong in principle. A fine of $250/- should be substituted for the term of imprisonment and the appellant should be disqualified from applying for licences to drive any class of vehicle for a period of 12 months.

Case referred to:

(1) *Public Prosecutor* v. *Hamdan bin Tahir* Revision Order No. 4 of 1981.

Obiter dictum: "The modern tendency in sentencing, as I understand it, is not to try to fill the jails at every conceivable opportunity, but only to send people to prison

where this is essential in the interest of society. I certainly do not regard it as in the interest of society to send people previously good character, particularly young people, to prison when there are other adequate means of dealing with them."

CRIMINAL APPEAL.

Alli Kawi for the appellant.

Kifrawi Kifli (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult

Rhind J.: On January 11, 1982 the Appellant pleaded guilty in the Magistrate's Court on 3 charges, the first being that on October 10, 1981 he drove a vehicle at a time when he was not the holder of a driving licence, contrary to section 16 of the Road Traffic Enactment, 1954, the second being that at the same time he drove the vehicle without a valid 3rd party insurance policy contrary to section 3(1) of the Motor Vehicle Insurance (3rd Party Risks) Enactment (Cap. 90), and thirdly that at the same time he took and drove the vehicle away without the consent of the owner contrary to section 34(2) of the Road Traffic Enactment.

On the charge of driving without a licence, he was fined $100/- or in default 10 days, on the uninsured driving charge the sentence was two months' imprisonment plus twelve months' disqualification, and on the charge of taking and driving away he was fined $100/- or 10 days in default.

He now appeals only against the term of imprisonment on the uninsured driving charge, on the ground that the sentence was too severe.

The facts relating to the offences were that the appellant was driving his friend's vehicle at the time on a family errand when he was stopped routinely at a Police road-block, and then all these offences came to light. There had been no damage to property or injury to persons. At the time of committing the offences, the appellant was eighteen years and ten months old. He was a Police Constable, having joined the Police Force in April 1980. He was obviously a man of good character, for otherwise he would not have been in the Police Force, and he had a clear record.

It was submitted on behalf of the Appellant that he comes within the category of "youthful offenders," as defined section 2 of the Criminal Procedure Code. In that section, "youthful offenders" is defined to include "any child convicted of an offence punishable by fine or imprisonment who in the absence of legal proof to the contrary is above the age of 7 and under the age of 18 years." If the appellant were a "youthful offender," the consequence would be that the court could deal with him under section 262 of the Criminal Procedure Code which makes provision for types of custodial sentence for youthful offenders other than imprisonment. I hold that because this appellant was 18 years and ten months old at the time of committing these offences, he cannot be said to be "under the age of 18 years." He is in fact of the age of 18 years, which is different from being "under" the age of 18 years. Therefore, section 262 of the Criminal Procedure Code will not apply to him.

Under section 3 of the Motor Vehicle Insurance (3rd Party Risks) Enactment it is provided that persons acting in contravention of that section shall be liable to "a fine of $1,000/- and imprisonment for 6 months." That punishment provision came into effect in April 1981, and replaced a provision which had previously declared the punishment to be "a fine not exceeding $1,000/- or to imprisonment for a term not exceeding six months."

Thus, the effective change was that the word "and" was substituted for the word "or" in the punishment provision.

In the case of *Public Prosecutor* v. *Hamdan bin Tahir*,[1] being Revision Order No. 4 of 1981, the Court was called upon to interpret the significance of this change from "or" to "and." It was then urged by the Prosecution that the effect of that change had been to introduce a mandatory sentence of a fine $1,000/- and imprisonment for 6 months in all cases of uninsured driving. The Court rejected that contention out of hand, and held that the court still had a discretion in the sentence to be imposed for this type of offence. However the learned Commissioner in that case went on to make the following observation:

"However, a change in legislation is not usually without some significance. It would seem from the comments of the learned Magistrate in his reference to this Court that in the past Magistrates have, at least with regard to first offenders, adopted a practice of never imposing imprisonment, regardless of the particular circumstances of the particular offence. While it is well established that the Court will always consider carefully before sending any first offender to prison, a rigid practice of that kind is, with respect, an abdication of a Court's particular responsibilities.

I would take the deliberate change in the legislation in this instance to be a clear indication by the legislature that a

prison sentence is considered to be appropriate in most cases, and that while there may still be occasional exceptions, Magistrates should, as a general rule, impose a sentence of some length or other in addition to a fine, bearing in mind that a maximum sentence is usually reserved for the really bad case of its kind or for persistent offenders.

Where there are no particular circumstances to influence the Magistrate one way or the other I would have thought that an appropriate sentence would be one of two to three months, together with such fine as reflects both the nature of the offence and the capacity of the defendant to pay."

With all respect to the learned Commissioner, I find myself in disagreement with the views that he has expressed in those paragraphs. I see nothing in the change from the word "or" to the word "and" in a provision of the nature to indicate that the Legislature ever intended that the normal sentence for this type of offence should be one of imprisonment. Bearing in mind that the maximum term of imprisonment that can be passed for this offence is only 6 months, I would have thought it far from clear that the Legislature would have regarded it as normal that offenders generally, let alone first offenders, should go to prison. By allowing for the possibility of both a fine and imprisonment, I would have thought the Legislature was merely contemplating that in cases where a term of imprisonment was correct in principle, then from the date of the amending provision a fine could be imposed in addition. I do not think that the mere change from "or" to "and" was a signal that the court should change its policy on which offenders merited selection for imprisonment for this offence.

I am certainly unaware of any principle of statutory interpretation to the effect that there can be both a fine and imprisonment, then in such circumstances the normal sentence is to be imprisonment. If the Legislature is seeking more frequent resort to imprisonment by the courts, the way it does so is either by increasing the maximum term of imprisonment the courts are empowered to impose or by providing that imprisonment is to be mandatory. It is a novel suggestion that the Legislature might do this by saying that imprisonment and a fine can be combined.

In terms of penalties for criminal offences, a maximum sentence of 6 months' imprisonment and a fine of $1,000/- is indicative that the Legislature does not regard an offence as being one of a high order of gravity, and for such an offence it would normally only be in a situation where there were aggravating circumstances that a court would take the step of sending an offender, particularly a first offender, to prison.

Far from agreeing with the learned Commissioner that a prison sentence is to be considered normal for offences under this section, I take the opposite view which is that a prison sentence should be the exception, at least for first offenders. The section does of course provide that magistrates can sentence even first offenders to imprisonment, but in my opinion, that power is to be exercised sparingly. The modern tendency in sentencing, as I understand it, is not to try to fill the jails at every conceivable opportunity, but only to send people to prison where this is essential in the interest of society. I certainly do not regard it as in the interest of society to send people of previously good character, particularly young people, to prison when there are other adequate means of dealing with them.

In the case before me, I consider that a sentence of imprisonment was wholly wrong in principle. The appellant is a very young man of good character, and the facts of the offence disclosed no circumstances of aggravation. I am aware that the appellant was a policeman, but it has to be borne in mind that he was a very young and inexperienced policeman, and this offence was in no way connected with his duties. I do not see how it would serve the public interest to send this particular appellant to prison.

In my view this offence should have been dealt with by way of a fine, together, of course, with the mandatory period of disqualification for 12 months. I understand that the appellant's salary was $520/- a month. Bearing that figure in mind, I regard the correct sentence as a fine of $250/- for this offence, and I substitute that for the term of imprisonment. Thus, for the offence of driving without 3rd party insurance, the sentence that the court substitutes is a fine of $250/- together with a disqualification from applying for licences to drive any class of vehicle for a period of 12 months.

Fine substituted for imprisonment.

Solicitors: *Alli Kawi & Co.*